

1999

RULES RESTRICTING PLAYER MOVEMENT UNDER THE FEDERATION INTERNATIONALE DE FOOTBALL: DO THEY VIOLATE U.S. ANTITRUST LAW?

Mark D. Mako

Follow this and additional works at: [https://digitalcommons.nyls.edu/
journal_of_international_and_comparative_law](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law)



Part of the [Law Commons](#)

Recommended Citation

Mako, Mark D. (1999) "RULES RESTRICTING PLAYER MOVEMENT UNDER THE FEDERATION INTERNATIONALE DE FOOTBALL: DO THEY VIOLATE U.S. ANTITRUST LAW?," *NYLS Journal of International and Comparative Law*: Vol. 18 : No. 3 , Article 3.

Available at: [https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol18/iss3/
3](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol18/iss3/3)

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

RULES RESTRICTING PLAYER MOVEMENT UNDER THE FEDERATION INTERNATIONALE DE FOOTBALL: DO THEY VIOLATE U.S. ANTITRUST LAW?

I. INTRODUCTION

Once again the world of soccer will make its mark in the courthouse.¹ For more than a century, soccer players in Europe have been restricted in their ability to move from team to team.² The Federation Internationale de Football Association ("FIFA"), the governing body of soccer worldwide, has restricted player movement by adopting two rules: a controversial transfer rule and a rule limiting the number of foreign players allowed on a team.³

1. *Fraser v. Major League Soccer, L.L.C.*, 7 F. Supp. 2d 73 (D. Mass. 1998). Ten players of Major League Soccer ("MLS") filed suit against the league on grounds that the league's single entity status violates U.S. antitrust law. *Id.* at 73.

2. Peter N. Katz, *A History of Free Agency in the United States and Great Britain: Who's Leading the Charge?*, 15 COMP. LAB. L.J. 371, 397-409 (1994). British football formed its own association called the Football Association ("FA") in 1863, and its regulations prevented players from moving from team to team under a retain-and-transfer system. *Id.* at 397-99.

3. See generally *Case C-415/93, Union Royale Belge des Societes de Football Ass'n v. Bosman*, 1995 E.C.R. I-4921, 1 C.M.L.R. 645 (1995). This case dealt with the issue regarding the transfer rules and their legality under Community law. *Id.* at I-5056. See also *Regulations Governing the Status and Transfer of Football Players* (visited Jan. 11, 1999) <<http://www.fifa.com/fifa/handbook/statutes/trans.preamble.html>> [hereinafter FIFA Regulations]. The current FIFA regulation regarding player transfer is Chapter V Article 14 of the Regulations. *Id.* This provides that a team must receive compensation if a player transfers to a new club. *Id.* Chapter III Article 6 of the Regulations concerns foreign player restrictions and provides that "only a player who is currently registered by a national association to play for one of its clubs shall be admitted to competitions organized by that national association." *Id.* Players who attempt to transfer from one national association to another must comply with Chapter III Article 6 and Chapter IV Article 7 in order to play. *Id.* Further, the regulations of Major League Soccer ("MLS") only allow a maximum of 5 international players on an MLS club. See *MLSNET: Regulations* (visited Jan. 11, 1999) <<http://www.mlsmnet.com/about/regulations.html>> [hereinafter MLS Regulations].

Recently, in *Union Royale Belge des Societes de Football Ass'n v. Bosman*, the European Court of Justice ("ECJ") limited the restrictions by holding that a European Union ("EU") citizen could not be denied his or her right to freedom of movement within the EU.⁴ FIFA changed its transfer rule and foreign player limits in order to comply with the ECJ's ruling.⁵ However, FIFA maintained the rules for foreign players who play in the EU and for any players who play outside the EU.⁶ With the new rule, FIFA sanctioned Major League Soccer ("MLS") in the United States ("US") while maintaining its transfer rule and foreign player limit, because MLS is designed as a single entity.⁷ MLS players seek the same benefits of the free market as their EU counterparts who play within the EU.⁸

This Note argues that the structure of MLS is not a "sham" and, as such, does not violate U.S. antitrust law. Part II discusses the history of U.S. antitrust law in the context of sports and the application of the single entity defense in antitrust cases. Part III discusses the history behind the FIFA rules restricting player movement within the EU, and briefly explains the rationale behind the *Bosman* decision. Part IV argues that Major League Soccer's single entity defense is valid and that it should withstand antitrust scrutiny. Part IV, also, asserts that an adverse ruling against MLS (and, by implication, FIFA) can lead to numerous problems in the world of soccer. If FIFA and all of the world soccer leagues are continually forced to abandon the rules restricting player movement, free agency will result in a sharp increase in player salaries, thereby forcing smaller-market teams out of the league and jeopardizing a league's existence.⁹ Finally, Part V applies U.S. Antitrust law and policy to the FIFA structure.

4. See *Bosman*, 1995 E.C.R. at I-5081.

5. FIFA Regulations, *supra* note 3. The FIFA Executive Committee caused the FIFA Regulations to come into effect on October 1, 1997. See also A. Craig Copetas & Stefan Fatsic, *Pitch Battle: Soccer's Lords Take on Free-Market Forces—Suits Over Player Transfers May Dictate Who Really Runs the Sport*, WALL ST. J. EUR., July 28, 1997, available in WESTLAW, News Library, ALLNEWS File.

6. Copetas, *supra* note 5.

7. Stuart Doughty, *Soccer—United States to Launch Professional League in 1995*, THE REUTER LIBR. REP., Dec. 7, 1993, available in LEXIS, World Library, ALLWLD File. FIFA sanctioned MLS in the U.S. See *About MLS* (visited Jan. 11, 1999) <http://www.mlsnet.com/about/#The_Structure.html>. The transfer rule is designed so that when a player's contract ends and the player signs with another team, the former team must be compensated. See Copetas, *supra* note 5. The foreign player restriction limits the number of foreign citizens allowed to play in MLS. *Id.*

8. Copetas, *supra* note 5.

9. *Id.*

Proponents of a free market may argue that American sports have survived under a free agency system and that FIFA should follow suit. This Note argues that American sports leagues have fallen prey to economic pressures and that FIFA's philosophy of maintaining the integrity of the game is a better method to combat economic pressures.¹⁰ FIFA, as the governing body of soccer worldwide, can outlaw the U.S. Soccer Federation ("USSF") if the Court rules against MLS. This will create further problems for the U.S. Soccer Team and could inhibit its chance of qualifying for the World Cup.¹¹ A ruling against MLS can also persuade FIFA to deny the right to form leagues in Africa, Latin America, and Asia.¹²

II. THE HISTORY AND PRINCIPLES OF U.S. ANTITRUST LAW

A. *The Emergence of Antitrust Law in American Sports*

1. A Brief History of the Sherman Act and its Application to Interstate Commerce

US antitrust law has had a serious impact on the world of sports, especially with regard to restraints on player movement.¹³ The Sherman Act was designed to outlaw monopolies and create fair competition among entities.¹⁴ Under Section 1 of the Sherman Act, "every contract, combination . . . or conspiracy, in the restraint of trade or commerce among the several states" is illegal.¹⁵ In 1922, U.S. antitrust law entered sports in the controversial case of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.¹⁶ In that case, the Supreme Court declared baseball exempt from antitrust law.¹⁷ The Court has refused to apply this exemption to other sports.¹⁸ However, Congress

10. *Id.*

11. *Id.*

12. *Id.*

13. MATTHEW C. MCKINNON ET AL., SPORTS LAW 3-1 (1996).

14. WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 52 (2d ed. 1993).

15. Sherman Act § 1, 15 U.S.C. § 1 (1994).

16. *See generally* *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

17. *Id.* at 208. The Court held that "the business . . . of baseball . . . [was] purely state affairs," and therefore, does not involve interstate commerce. *Id.*

18. *See* *Flood v. Kuhn*, 407 U.S. 258 (1972). Here, the court was unwilling to change

recently enacted the Curt Flood Act, thereby legislatively overruling the exemption for baseball.¹⁹

2. The Court's Legal Approach to an Antitrust Controversy

There are two tests that a court may use when declaring a violation under Section 1 of the Sherman Act.²⁰ The first test is whether the action taken by a league is a per se violation.²¹ A per se violation results when agreements or "practices have been deemed to be so pernicious as to be illegal per se [such as] boycotts and concerted refusals to deal."²² However, the courts usually rely on the second test when determining a violation under the Act.²³ The second test is the Rule of Reason approach.²⁴ This test decides "whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary."²⁵

the exemption with regard to baseball even though they knew that the sport affected interstate commerce. The court deferred the matter to legislature and reserved the exemption to baseball under stare decisis. *Id.* at 284. However, the Supreme Court made clear that the baseball exemption did not apply to other sports like football and basketball because they do effect interstate commerce. See *Haywood v. National Basketball Ass'n*, 401 U.S. 1204, 1205 (1971); *Radovich v. National Football League*, 352 U.S. 445, 452 (1957).

19. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

20. *Mackey v. National Football League*, 543 F.2d 606, 616 (8th Cir. 1976). The district court held that the Pete Rozelle Rule was a per se violation of the Sherman Act. *Id.* at 620. However, the 8th Circuit felt the Rule of Reason test was more appropriate. *Id.*

21. *Id.* at 618-20. A court will only find an antitrust violation if the agreement is unreasonable. *Id.* at 618. "As the court gained experience with antitrust problems arising under the Sherman Act, they identified certain types of agreements as being so consistently unreasonable that they may be deemed to be illegal per se, without inquiry into their purported justifications." *Id.* (quoting *Northern Pac. R.R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

22. *Id.* at 618.

23. *CHAMPION*, *supra* note 14, at 53. Even though teams compete against one another, professional sports can not survive without some form of cooperation between the teams. For example, in order to maintain the existence of a sports league, all of the members must agree to follow the rules to be enforced in the game. *Id.* at 55.

24. See *Mackey*, 543 F.2d at 620.

25. *Id.*

3. Player Restraints Utilized by American Sports

American sports have used various methods to restrain movement of players among the teams, such as draft systems and option or reserve clauses.²⁶ *Mackey v. National Football League* addresses the issue of restrictions on free agency.²⁷ The National Football League ("NFL") implemented the Rozelle Rule. Under this rule, if a player's contract expired and the player signed with another team, the new team had to compensate the former team.²⁸ If the teams did not reach an agreement regarding compensation, then the Commissioner would step in to make the determination.²⁹ The Court, utilizing the Rule of Reason test, held that the Rozelle Rule was an unreasonable restraint on trade.³⁰

B. The Single Entity Defense and Its Role in American Sports

1. The Basic Concept Behind the Single Entity Defense

Section 1 of the Sherman Act prevents acts of collusion between two participants.³¹ Therefore, if an antitrust issue came before a court and it was determined that only a single entity existed, there would be no reason to determine whether an antitrust controversy existed under Section 1 of the

26. MCKINNON, *supra* note 13, at 3-28. The leagues have set up regulations and devices primarily to restrict player movement.

The draft is the method used by team sports to allocate players who have not previously played professional sports. Athletes who are eligible for the draft are generally selected in the reverse order of the team's standing from the previous year's competition. . . . Reserve or option systems typically give the team for whom an athlete is currently playing, a unilateral right to renew the contract for an additional period of time under the same terms and conditions as the current contract. As with the draft, the number of times a team can unilaterally 'renew' a contract varies from league to league.

Id.

27. See generally *Mackey*, 543 F.2d 606.

28. *Id.* at 609. The Rozelle Rule was quite similar in nature to FIFA's transfer rules by requiring that the former team be compensated. See *supra* note 3 and accompanying text. Under the Rozelle Rule, compensation was usually money, current players, or future selections in the draft. See CHAMPION, *supra* note 14, at 54.

29. See *Mackey*, 543 F.2d at 609.

30. *Id.* at 622.

31. Bradley I. Ruskin et al., *Fraser v. Major League Soccer and the League "Single Enterprise" Defence*, SPORTS L. ADMIN. & PRAC., May-June 1997, at 6, 7.

Act.³² Many leagues have tried to utilize this defense and failed. However, the recent application of the single entity defense has provided a valid exception to antitrust liability.³³

2. History Behind the Single Entity Defense

The early stages of the single entity defense had virtually no bearing on antitrust law until 1984.³⁴ Prior to 1984, many sports leagues tried to invoke the defense but had continually failed.³⁵ In one instance, the North American Soccer League ("NASL") sued the NFL for violation of the Sherman Act.³⁶ Specifically, the NASL wanted the NFL's ban on cross-ownership of other sports franchises to be abolished.³⁷ The NFL claimed that it was a single entity and, as such, could not be found liable of violating the Sherman Act.³⁸ However, the Supreme Court held that the cross-ownership regulation failed under the Rule of Reason test, violating antitrust law.³⁹ On the single entity claim, the Court ruled that the anti-competitive effects of the rule outweighed the benefits of the restraint and thus, the structure of the league should not be used as an escape clause from liability.⁴⁰

The NFL tried using the single entity defense again in *Los Angeles Memorial Coliseum v. National Football League*.⁴¹ Los Angeles Memorial

32. *Id.* at 6. The Sherman Act requires that "in order to constitute a conspiracy two separate business entities must be involved." *Id.*

33. *Id.*

34. *See generally* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). This Supreme Court decision led to the utilization of the single entity defense in the context of sports leagues. Ruskin, *supra* note 31, at 6.

35. Ruskin, *supra* note 31, at 6.

36. *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1250 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982). The issue the court faced was whether agreements between members of the NFL, prohibiting its members from making investments in other leagues such as NASL, violated the Sherman Act. *Id.* at 1250.

37. *Id.* at 1255. NASL wanted the court to abolish the restriction because of the limited resources that were available. *Id.* at 1253. Only owners with substantial assets were able to purchase NASL teams. *Id.*

38. *Id.* at 1256.

39. *Id.* at 1261.

40. *Id.* at 1257-58, 1261.

41. *See generally* *Los Angeles Mem'l Coliseum v. National Football League*, 726 F.2d 1381, 1387 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984). Al Davis, the managing general partner of the Oakland Raiders, sought to move his team to Los Angeles after the Oakland Coliseum contract expired and his attempts to secure improvements to the Oakland

Coliseum sued the NFL claiming the league's rule restricting franchise movement violated Section 1 of the Sherman Act.⁴² Again, the Court was unwilling to allow the NFL to claim single entity status.⁴³ More specifically, the Court found that each of the teams were single structures competing with one another.⁴⁴ The Supreme Court was unwilling to apply the defense in the context of the structures of major sports leagues. Nonetheless, the Court still did not completely abandon the theory behind this defense.⁴⁵

3. The Single Entity Defense Attains Validity

In 1984, the single entity defense developed a following outside the realm of sports.⁴⁶ In *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court allowed Copperweld Corporation and its wholly owned subsidiary to use the single entity defense.⁴⁷ The plaintiff brought an action claiming that the Copperweld Corporation and its subsidiary violated antitrust law.⁴⁸ The Court ruled that the parent and its subsidiary could not possibly be in violation of antitrust law under Section 1 of the Act because they were incapable of conspiring with one another.⁴⁹ Copperweld Corporation and its wholly owned subsidiary were a single entity.⁵⁰

Coliseum failed. *Id.* at 1385.

42. *Id.* at 1387.

43. *Id.* at 1390.

44. *Id.* The court found that:

[I]n addition to being independent business entities, the NFL clubs [did] compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

Id.

45. See *North Am. Soccer League*, 459 U.S. at 1077 (Rehnquist, J. dissenting). "[The] NFL teams compete with one another on the playing field; [however,] . . . [i]n all other respects, the [NFL] competes as a unit against other forms of entertainment." *Id.*

46. See generally *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

47. *Id.* at 775-77.

48. *Id.* at 757-58.

49. *Id.* at 777.

50. *Id.* at 771.

Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld. . . . Under either arrangement [as an unincorporated division or a wholly owned subsidiary], Regal might have acted to bar a new competitor from

Further, the Court found that the agreement between Copperweld and its subsidiary was different from the situation where two separate entities conspire.⁵¹ The Court reasoned that prior to conspiring, two separate entities have different economic interests, whereas a parent and wholly owned subsidiary do not have separate economic interests.⁵² There are two factors that the court should consider when a corporation utilizes this defense.⁵³ First, the court must determine if the entity has a "complete unity of interests."⁵⁴ Second, the court must determine "whether the alleged restraint brings formally independent economic factors into a common plan."⁵⁵

4. The Single Entity Defense Under *Copperweld* as Applied to Sports Structures

The single entity defense under *Copperweld* was utilized by the Professional Golf Association ("PGA") in *Seabury Management, Inc. v. Professional Golf Ass'n of America, Inc.*⁵⁶ The structure of the PGA

entering the market. . . . From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other.

Id. at 774.

51. *Id.* at 769, 771.

52. *Id.*

53. Ruskin, *supra* note 31, at 6.

54. See *Copperweld Corp.*, 467 U.S. at 771. Under the first factor, a "parent and its wholly owned subsidiary have a complete unity of interest." *Id.* The court mentioned that a parent and subsidiary may be able to conspire and listed factors to consider to "measure the 'separateness' of the subsidiary." *Id.* at 771 n. 18.

[However,] when a subsidiary is wholly owned, . . . these factors are not sufficient to describe a separate economic entity for purposes of the Sherman Act. . . . [The factors] cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.

Id.

55. Ruskin, *supra* note 31, at 6. Under the second factor, the court must look at whether separate economic factors existed prior to the alleged restraint.

Separate incorporation may improve management, avoid special tax problems arising from multistate operations, or serve other legitimate interests. . . . [A] business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.

See *Copperweld Corp.*, 467 U.S. at 772-73.

56. See generally *Seabury Management, Inc. v. Professional Golf Ass'n of Am., Inc.*,

consisted of its main association and several regional sections.⁵⁷ Each office was separately incorporated and controlled by the PGA.⁵⁸ The plaintiff claimed that the PGA and one of its regional sections had violated the Sherman Act.⁵⁹ The District Court of Maryland decided that the PGA was a single entity⁶⁰ by looking at the structure of the PGA.⁶¹ Ultimately, the court reasoned that the PGA and its regional section could not possibly conspire because “the PGA . . . function[s] as a single economic unit with the PGA, possessing ultimate control over the actions of the individual sections.”⁶²

The National Basketball Association (“NBA”) also tried to invoke the single entity defense in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass’n*.⁶³ The Chicago Bulls and WGN television sued the NBA claiming that a league regulation restricting the number of cable telecasts of Chicago Bulls games was an illegal restraint on trade.⁶⁴ The court did not rule on the structure of the NBA but did state that a sports league could utilize the single entity defense.⁶⁵ Further, the court stated that in order to determine if a sports league is a single entity “it is essential to investigate [the league’s] organization and [utilize] *Copperweld’s* function question one league at a time—and perhaps one *facet* of a league at a time.”⁶⁶

878 F. Supp. 771 (D. Md. 1994).

57. *Id.* at 777.

58. *Id.*

59. *Id.* Seabury Management, Inc. (“Seabury”) argued that “the PGA and MAPGA, a PGA section, conspired to limit Seabury’s ability to conduct a golf trade show in violation of the Sherman Act. . . .” *Id.*

60. *Id.* at 778.

61. *Id.*

62. *Id.* at 777.

63. *See generally* *Chicago Prof’l Sports Ltd. Partnership v. National Basketball Ass’n*, 95 F.3d 593 (7th Cir. 1996) (analyzing whether the NBA should be considered a single firm when selling broadcast rights to networks under the Rule of Reason approach).

64. *Id.* at 595. *See also* Jeffrey Gewirtz, *The NBA Loses Another Round in the Superstation Fight*, *THE SPORTS LAW*. (Sports Law. Assoc.) July–Aug. 1995, at 1. The NBA reduced the number of games that WGN Television was able to televise from 25 to 20 games. *Id.*

65. *See Chicago Professional Sports Ltd. Partnership*, 95 F.3d at 598–99.

66. *Id.* at 600.

Since *Copperweld*, the NFL has repeatedly tried to invoke the single entity defense.⁶⁷ On two occasions, the court refused to allow the defense.⁶⁸ On one occasion, the court held in *Sullivan v. National Football League* that the NFL did not function under a "unity of interests."⁶⁹ The NFL teams each "pursued interests diverse from those of the [NFL]."⁷⁰ Specifically, the court found that the NFL teams compete against each other for players, coaches, fans, and broadcast revenues.⁷¹

III. THE HISTORY BEHIND THE TRANSFER RULES

A. *An Introduction to the World of Soccer and the Creation of the Transfer Rules*

1. England's Football Clubs

Football (referred to as "soccer" in the United States) started during feudalism in England.⁷² English society held on to the sport with great enthusiasm during that time and, later on during the 1800's, many football clubs formed in England.⁷³ It was in 1863, that the Football Association ("FA") was formed.⁷⁴ Although many other football associations formed throughout England, the FA was considered the primary authority of football.⁷⁵ The other associations, usually amateur clubs, were considered secondary.⁷⁶

67. See *Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1964), *cert. denied*, 115 S.Ct. 1252 (1995). William H. Sullivan II, and his son sold their interest in the New England Patriots after the NFL refused to allow Sullivan to sell stock in the NFL team to the public. *Id.* at 1096. Sullivan argued that the NFL policy restricting Sullivan to sell stock in his team was a violation under the Sherman Antitrust Act. *Id.* See also *McNeil v. National Football League*, 790 F. Supp. 871, 878 (D. Minn. 1992).

68. See *Sullivan*, 34 F.3d at 1090; *McNeil*, 790 F. Supp. at 880.

69. See *Sullivan*, 34 F.3d at 1099.

70. *Id.*

71. Ted Curtis & Jeffrey Gewirtz, *NFL Wins New Trial in Sullivan Antitrust Case*, THE SPORTS LAW. (Sports Law. Assoc.), Mar.-Apr. 1995, at 9.

72. Katz, *supra* note 2, at 397.

73. *Id.*

74. *Id.*

75. *Id.* at 398.

76. *Id.*

2. The Beginning of the Retain and Transfer Rule

The FA, upon its inception, set up regulations for the clubs in order to have a unified set of rules between its members and for football.⁷⁷ As the sport grew in popularity, players embraced football as a career choice.⁷⁸ Hence, football became a professionalized sport as players were paid salaries for their performances.⁷⁹ Wishing to keep its players from the other competing associations, the FA set up the Retain and Transfer Rule.⁸⁰

3. The FA Retain and Transfer Rule

This Retain and Transfer Rule was designed primarily to limit player movement.⁸¹ This rule was also designed in order to preserve the integrity of the game and preserve competition between clubs.⁸² The FA feared that smaller market clubs would be unable to compete with the larger market clubs without a retain and transfer rule.⁸³ Teams with the most money would have an unfair advantage and jeopardize the smaller market clubs, possibly endangering the existence of the FA.⁸⁴

The rule stated that, "after a player's contract had expired, an option period, controlled exclusively by the club, began."⁸⁵ The club could exercise the option, and the player would at least receive the benefits of his existing contract.⁸⁶ The players who signed, or were in the process of signing, were put on a retention list.⁸⁷ If the option was not exercised, the player would be put on a transfer list. Other teams that wanted to sign this player were required to pay the former team.⁸⁸

77. *Id.* at 397. The FA members "agreed to play each other under one set of rules." *Id.*

78. *Id.* at 398-99. Players at the age of 18 seeking to attain an education instead of entering professional football are required to wait two years before signing a professional contract. *Id.*

79. *Id.*

80. *Id.* at 401-02.

81. *Id.*

82. *Id.* at 402.

83. *Id.*

84. *Id.*

85. *Id.* at 401.

86. *Id.*

87. *Id.* at 402.

88. *Id.*

4. The Legality of the Transfer Rules

Eastham v. Newcastle United Football Club is a case which attacked football's rules restricting player movement.⁸⁹ The court decided an issue regarding the legality of the retain and transfer rule utilized by FA.⁹⁰ The court ruled that the practice of placing players on a retention list was a restraint on trade.⁹¹ However, the court did allow the transfer rule to continue.⁹² The court reasoned that players were not restricted in their ability to move under the transfer rule.⁹³ By taking into consideration the fact that the rule allowed a player to appeal a transfer fee, the court decided that the players were still able to move freely.⁹⁴

5. Other Regulations Designed to Restrain Player Movement

The FA also restricts player movement by maintaining limits on the number of foreign players that team may have on its roster.⁹⁵ The foreign player limit rule was prevalent under FA regulations when the FA joined FIFA.⁹⁶ All FIFA members have enforced such a regulation on their teams.⁹⁷ FIFA maintains such a regulation in order to preserve football at the international level.⁹⁸ However, the validity behind this rule started to fall apart due to a European Community ("EC") decision in *Dona v. Mantero*.⁹⁹ The court held that EC members cannot be restricted from playing football in other EC member states.¹⁰⁰ Although the FA was

89. See generally *Eastham v. Newcastle United Football Club*, [1964] 1 Ch. 413 (Eng. 1963).

90. *Id.* at 421.

91. *Id.* at 429-31.

92. *Id.* at 431, 437.

93. *Id.*

94. *Id.*

95. Katz, *supra* note 2, at 405.

96. *Id.*

97. Jon S. Greenwood, *What Major League Baseball Can Learn From Its International Counterparts: Building a Model Collective-Bargaining Agreement for Major League Baseball*, 29 GEO. WASH. J. INT'L L. & ECON. 581, 606 (1995).

98. Copetas, *supra* note 5, at 1. Again, FIFA's motto is "for the good of the game." *Id.*

99. See generally Case 13/76, *Dona v. Mantero*, 1976 E.C.R. 1333, 2 C.M.L.R. 578 (1976).

100. *Id.* at 1342.

unwilling to follow the EC ruling, the FA was forced to comply with the essential holding following the *Bosman* decision.¹⁰¹

B. The Bosman Decision

1. The Facts Behind the *Bosman* Decision

The *Bosman* decision virtually declared the transfer rule and the foreign player restrictions on EU players under the FA and FIFA illegal under Community Law.¹⁰² Jean-Marie Bosman, a Belgian national brought an action against Union Royale Belge des Societes de Football Association ("URBSFA").¹⁰³ He wanted the URBSFA rules restricting player movement declared illegal after the association denied him the ability to secure a contract with a French division team.¹⁰⁴ Bosman played for a Belgium football club, the RC liege.¹⁰⁵ After refusing to sign with the team, Bosman was placed on the transfer list and signed with the French team US Dunkerque.¹⁰⁶ US Dunkerque paid the transfer fee but the transfer did not take effect and forced Bosman to sit out an entire season.¹⁰⁷

2. The Ruling by the ECJ

The ECJ held that the transfer rule and the restrictions on foreign players were inconsistent with Community law.¹⁰⁸ The ECJ looked at the rules and applied them to the Treaty Establishing the European Community ("EC Treaty").¹⁰⁹ Specifically, Article 48 protects the freedom of movement for workers in the 15 Member States of the EU.¹¹⁰ Also, "discrimination on grounds of nationality is prohibited within the EC Treaty's scope of application."¹¹¹ By invoking Article 48 of the EC Treaty,

101. Katz, *supra* note 2, at 406, 407.

102. See *Bosman*, 1996 E.C.R. at I-5081.

103. *Id.* at I-5051, I-5053.

104. *Id.* at I-5053.

105. *Id.* at I-5050.

106. *Id.* at I-5050, I-5051.

107. *Id.* at I-5051.

108. *Id.* at I-5081.

109. *Id.* at I-5062, I-5073. See Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC TREATY].

110. EC TREATY art. 48.

111. Andrew W. Lee, *The Bosman Case: Protecting Freedom of Movement in European*

the ECJ ruled that the transfer rule and the rule limiting foreign players violates the provision guaranteeing free movement.¹¹²

3. The Effects of the ECJ Ruling

The *Bosman* ruling has drastically changed the application of the restrictions on player movement in the EU.¹¹³ FIFA and its members lobbied "member State governments for an amendment of the EC Treaty to exempt sports associations from Community law on freedom of movement for workers."¹¹⁴ One year after the *Bosman* decision, FIFA changed its transfer rule to comply with the ECJ's ruling.¹¹⁵ There have been some problems for players who attempted to transfer under the new rule because of the rule's inconsistencies.¹¹⁶

Football, 19 FORDHAM INT'L L.J. 1255, 1264-65 (1996) (citing EC TREATY art. 6).

112. See *Bosman*, 1996 E.C.R. at I-5081 (note that Article 48, which deals with free movement between member nations, applies to professional sports players).

113. Copetas, *supra* note 5.

FIFA [amended] its edicts to comply with the court's judgment and said players could change teams within the EU without transfer fees at the end of their contracts. The decision gave players the right to test their value on the open market, and allowed the wealthier club owners to take off on cross-border player-buying sprees.

Id.

114. Lee, *supra* note 111, at 1258.

115. Copetas, *supra* note 5. FIFA changed its transfer rule but the rule only applies to EU citizens playing in the EU. *Id.*

FIFA's . . . bewildering immigration rules, which require leagues to pay substantial compensation before signing a player who previously played for another league or team, even if the player is no longer under contract, remain enforced everywhere outside the EU, and inside the EU for those foreign players signed to European teams and who wish to move elsewhere in the union.

Id.

116. *Id.* "FIFA validated Inter Milan's estimated \$40 million purchase package for Ronaldo, the Brazilian striker from FC Barcelona." *Id.* FIFA could have prevented the deal, but FIFA did not. *Id.* Yet, FIFA did block a French player (EU citizen) from transferring from a non-EU team to an EU team. *Id.*

IV. FIFA TRANSFER RULE & FOREIGN PLAYER RESTRICTIONS IN MLS

A. The Startup of MLS

1. History of Soccer in America

American soccer has had its ups and downs over the years.¹¹⁷ Prior to MLS, other professional soccer leagues formed in the U.S. and tried to achieve the status and popularity of other American sports leagues.¹¹⁸ For the most part, the U.S. had been without an outdoor professional soccer league.¹¹⁹ Also, the U.S. has not had a very strong national team in the past.¹²⁰ However, just recently, the U.S. started competing at the national level with some success.¹²¹ This helped create a newfound popularity for the sport.¹²²

117. *See* North Am. Soccer League v. National Football League, 670 F.2d 1249, 1252 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982). One American professional soccer league, NASL, was founded in 1968. *Id.* "Soccer was not a widely followed or popular sport when the NASL was founded, and several earlier attempts to put together a professional soccer league failed due to lack of fan interest." *Id.* NASL did flourish in the 1970s due to players like Pele and Franz Beckenbauer; however, the league folded in 1984. *America Tastes and Sees the Game is Good*, SCOTLAND ON SUNDAY, July 17, 1994, available in LEXIS, World Library, ALLWLD File.

118. *See supra* note 117 and accompanying text.

119. *U.S. Soccer League Start Postponed for a Year*, REUTERS NORTH AMERICAN WIRE, Nov. 16, 1994, available in LEXIS, World Library, ALLWLD File. *See also* Sven Busch, *World Cup a Success in America, but What about the New League*, DEUTSCHE PRESSE-ARGENTUR, July 13, 1994, available in LEXIS, World Library, ALLWLD File.

120. Colin Malam, *Soccer World Cup: FIFA Bask in Smash-Hit Success USA 94*, SUNDAY TELEGRAPH, July 17, 1994, available in LEXIS, World Library, ALLWLD File. In the 1990 World Cup, the U.S. lost every single match. *Id.*

121. *Id.*

Happily, [the U.S. has] made significant progress since their harsh World Cup experience four years ago, when they lost every game. Beating Columbia . . . 2-1 and losing only 1-0 to Brazil [the winners of World Cup 94] could prove real land marks in their development. It is accepted here that a strong professional domestic league is essential to the United States' prospects of ever making a realistic challenge for the World Cup.

Id.

122. *Id.* Attendance at the 1994 World Cup in America has been record setting when compared to all the prior World Cup tournaments. *Id.*

2. The World Cup

Soccer's increased popularity was largely due to the U.S.'s ability to compete in the World Cup Tournaments.¹²³ The U.S.'s interest in soccer increased when FIFA selected the U.S. as the host of the 1994 World Cup.¹²⁴ This was unusual because MLS did not have a top level outdoor professional soccer league.¹²⁵ However, FIFA made a concession to the U.S., especially in light of the large market potential.¹²⁶

3. Conditions Under which the U.S. was Awarded the 1994 World Cup Tournament

FIFA imposed a condition subsequent after awarding the World Cup Tournament to the U.S.¹²⁷ The U.S. was required to start up a new outdoor professional soccer league.¹²⁸ The President of the USSF, Alan Rothenberg, headed the plans for the new league, MLS.¹²⁹ With the increased popularity of soccer, the timing for the MLS was perfect.¹³⁰ However, the league opening was postponed for a year in order to raise capital, attract more investors, lock in cities that were awarded franchises, and attract overseas players.¹³¹

123. See *supra* note 121 and accompanying text. "The U.S. team [has] . . . gained respect and [has] been invited to play at the Maracana stadium in Rio against world champions Brazil and against England at soccer temple Wimbly." Paul Radford, *Soccer—Americans Launch 10-Year Plan for U.S. Soccer*, REUTERS NORTH AMERICAN WIRE, July 18, 1994, available in LEXIS, World Library, ALLWLD File.

124. *U.S. Soccer League Start Postponed for a Year*, *supra* note 119.

125. *Id.*

126. *America Tastes and Sees that the Game is Good*, *supra* note 117. FIFA made \$75 million in profits from World Cup 94. *Id.*

127. *U.S. Soccer League Start Postponed for a Year*, *supra* note 119. "When FIFA surprised the soccer world by awarding the 1994 World Cup to the United States a country that [had] no outdoor league a major condition was that a top level division one professional soccer league be developed." *Id.*

128. *Id.*

129. *America Tastes and Sees that the Game is Good*, *supra* note 117; *About MLS*, *supra* note 7.

130. See Jim Slater, *World Cup Opportunity Lost for U.S. Football*, AGENCE FRANCE PRESSE, Dec. 20, 1994, available in LEXIS, World Library, ALLWLD File. The success of the U.S. World Cup provided a perfect opportunity for the start up of MLS because of increased fan support and the shutdowns of Major League Baseball and the National Hockey League. *Id.*

131. *Id.* See also Ken Jones, *Football: Major League Soccer or Fantasy League?*, THE

B. The Structure of MLS

1. The Corporate Form of MLS

MLS, a limited liability company, owns twelve teams in the U.S.¹³² The league operates as a single entity.¹³³ Investors operate ten teams in the league, while MLS operates the other two.¹³⁴ Most of the investors are part of the MLS management committee.¹³⁵ The management committee handles all of the business decisions, such as, negotiating contracts, paying salaries, assigning players to teams, and conducting a player draft.¹³⁶ Each investor shares the profits and losses on a pro rata basis, similar to shareholders in a corporation.¹³⁷ In addition, investors share in the revenues and expenses.¹³⁸ The team operators receive a salary for running the operation of the team, which includes the hiring of personnel.¹³⁹

2. The Arguments For and Against the Structure of MLS

In *Fraser v. Major League Soccer*,¹⁴⁰ ten players have filed a suit asking District Court Judge O'Toole to declare that the structure of MLS is a "sham," it restricts player movement, and MLS, USSF, and FIFA have

INDEPENDENT, Nov. 12, 1994, available in LEXIS, World Library, ALLWLD File.

132. *About MLS*, *supra* note 7.

133. *Id.*

134. In 1996, MLS started out with ten teams. MLS owned all ten teams, but investors operated seven teams while MLS operated the other three. See Ruskin, *supra* note 31, at 7. MLS currently owns twelve teams with the adding of the 1998 expansion teams, the Chicago Fire and Miami Fusion. See *About MLS*, *supra* note 7. However, MLS now operates only two teams, the Dallas Burn and the Tampa Bay Mutiny. See Jerry Langdon, *MLS Gets \$100 Million Infusion*, GANNETT NEWS SERVICE, Nov. 9, 1998, available in WESTLAW, News Library, ALLNEWS File. The expansion teams are operated by investors. See Frank Dell'Apa, *It's Political Football in Champions League*, THE BOSTON GLOBE, Nov. 25, 1998, available in WESTLAW, News Library, ALLNEWS File; and Ike Kuhns, *Orlando Chosen to Host 1998 All-Star Game*, THE STAR LEDGER, July 9, 1997, available in WESTLAW, News Library, ALLNEWS File.

135. Ruskin, *supra* note 31, at 7.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Fraser v. Major League Soccer, L.L.C.*, 7 F. Supp. 2d 73 (D. Mass. 1998).

conspired in violation of Section 1 of the Sherman Act.¹⁴¹ The players feel that the transfer rule is being used in order to prevent salary increases.¹⁴² The players also want to operate under a free agency system without any restraints on player movement.¹⁴³ MLS believes that the single corporate entity structure is necessary in order to promote the game in America.¹⁴⁴ Specifically, MLS responded to the complaint by asserting the single entity defense, arguing that its actions cannot be challenged under antitrust law.¹⁴⁵

3. MLS as a Single Entity

The MLS structure does appear to fall within the single entity structure test under *Copperweld*.¹⁴⁶ By applying the facts of *Frasier* to the *Copperweld* test, MLS can show that its structure is exactly that of a principal and its wholly owned subsidiaries¹⁴⁷ which may claim the single entity defense.¹⁴⁸ In addition, MLS exercises centralized control over the operations by "making all the corporate decisions affecting the league and the teams."¹⁴⁹ Further, the teams are not separate entities competing with one another outside the sport, because no separate person actually owns one team alone.¹⁵⁰ In fact, two of the teams are run by MLS while ten are operated by investors.¹⁵¹ Investors own units in MLS, not the teams.¹⁵² The fact that all of the investors share in the investment of MLS and not in an individual team's income proves that the teams are not in competition with each other off the field.¹⁵³

141. Copetas, *supra* note 5; Ruskin, *supra* note 31, at 7.

142. *Players Want FIFA Rules Kicked Out of Bounds*, EDMONTON J., May 6, 1997, available in WESTLAW, News Library, ALLNEWS File.

143. Copetas, *supra* note 5.

144. *About MLS*, *supra* note 7.

145. Ruskin, *supra* note 31, at 7.

146. See *supra* text accompanying notes 54-55. The text indicates the factors that must be applied in determining a single entity. *Id.*

147. See *supra* note 54 and accompanying text.

148. Ruskin, *supra* note 31, at 7.

149. *Id.*

150. *Id.*

151. See *supra* note 134 and accompanying text.

152. Ruskin, *supra* note 31, at 7.

153. *Id.*

*C. The Implications of an Adverse Ruling to the Transfer Rule
Demands that the Rule be Allowed*

1. A Fee Agency System will Substantially Hurt the Integrity of Soccer

FIFA and MLS want to preserve the integrity of the game.¹⁵⁴ FIFA has maintained one motto throughout its long history: “for the good of the game,” and it incorporates this motto into its rules and regulations.¹⁵⁵ FIFA is concerned that if there are no checks on player movement chaos will take over the league.¹⁵⁶ Primarily, FIFA does not want to see player salaries skyrocket.¹⁵⁷ The reason behind FIFA’s fear is because certain large-market teams may enjoy an advantage over small-market teams.¹⁵⁸ Teams with more money will be able to attract the better players in the leagues.¹⁵⁹ Also, FIFA does not want to see MLS take all of the world’s foreign players, thus damaging other leagues.¹⁶⁰ This author believes FIFA is probably afraid that the best players around the world will only want to play for MLS because of the chance to attain great wealth in the U.S.

2. FIFA does not want to Succumb to the Economic Pressures that have Permeated American Sports

Some commentators argue that American sports leagues have been able to survive under a free agency system. This author agrees that such an argument is valid because all the major sports leagues still do exist. However, such an argument fails to explain the economic pressures the four

154. Copetas, *supra* note 5; *About MLS*, *supra* note 7.

155. Copetas, *supra* note 5.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* This will severely hurt the smaller market teams where they will no longer be able to compete and may have to abandon their markets or fold. *Id.* This can severely damage an entire league’s existence. *Id.*

160. *MLS Regulations*, *supra* note 3.

MLS teams are allowed a maximum of five (5) international players on their active rosters. MLS has established that a player is considered an international player unless: the player is a [US] citizen, the player is in the [US] as a resident alien (green card) or under asylum protection and is eligible to play for the U.S. National Team.

Id.

leagues (football, hockey, baseball, and basketball) have succumbed to and does not fully consider the FIFA philosophy.

Two of the four major leagues have tired the fans with constant bickering between management and labor.¹⁶¹ The desire to attain the most wealth during the baseball stoppage made many of the fans stray away from America's greatest pastime.¹⁶² The NFL has also hurt the fans by giving owners the ability to seek new stadiums and allowing the owners to find ways to circumvent the salary cap and revenue sharing agreements.¹⁶³ Cities are being extorted by the demands of NFL owners, especially with regard to stadium economics.¹⁶⁴ It appears that the motivating factor is money. FIFA wants to profit just like any other sports organization but it is unwilling to allow itself to succumb to the pressure by letting players force management to increase their salaries.¹⁶⁵ FIFA seeks to maintain the spirit of the game.¹⁶⁶ Some argue that this is unrealistic due to profit motive and lucrative television contracts.¹⁶⁷ However, FIFA has been able to succeed without completely changing its rules and overall motto. This author does not think that FIFA is completely ignorant to the desire of attaining wealth, but their motto is designed to maintain the integrity of the game. Part of this integrity is to maintain fan loyalty and not become completely absorbed with the large money potential of soccer. This is just

161. See *supra* text accompanying note 129. The baseball and hockey strikes in 1994 created some fan disparity. This helped create some fan support for soccer. The recent public disfavor with the NBA strike also shows how fans are upset with management and players fighting over money.

162. Thomas Boswell, *The NFL's Pandora's Box; NFL's TV Deal Could Open Pandora's Box*, WASH. POST., Jan. 16, 1998, available in 1998 WL2462345 WESTLAW, News Library, ALLNEWS File.

163. Edward Robinson, *It's Where You Play that Counts*, FORTUNE, July 21, 1997, at 57. "Because of new economic realities, team owners are now willing to pull up stakes, alienate their devoted fans, and move clear across the country in order to get a new stadium." *Id.* Damon Hack, *It's Time for the NFL's Oldest Team to Retool Among Free Agents, Stubblefield, Floyd are 49ers' Top Priorities*, THE SACRAMENTO BEE, Jan. 13, 1998, available in WESTLAW, News Library, ALLNEWS File. For example, "the 49ers have found ways to circumvent the cap in previous seasons." *Id.* Geoff Hobson, *A Rivalry in NFL Philosophy Bengals, Cowboys Differ in Approach*, CIN. ENQUIRER, Dec. 10, 1997, available in WESTLAW, News Library, ALLNEWS File. Another example is Jerry Jones of the Dallas Cowboys who made further plans to cut the Cowboys from the NFL's revenue sharing plan. *Id.*

164. Robinson, *supra* note 163, at 54.

165. Copetas, *supra* note 5.

166. *Id.*

167. *Id.*

another part of the reason why FIFA wants to keep its rules intact.¹⁶⁸ Further, World Cup soccer is the most popular sport in the world.¹⁶⁹ Therefore, this author believes FIFA's motto should be used as a model for other sports.¹⁷⁰

3. The Possible Expulsion of the USSF

Since FIFA required the USSF to start MLS, they may expel the USSF for noncompliance with FIFA's rules. At this point in time, the USSF has worked hard to gain standing in the international realm of soccer.¹⁷¹ The U.S. has succeeded in attaining top level status in sports over the years. However, it has taken the U.S. a long time to even be viewed by the world as a perennial soccer power.¹⁷² Soccer is by far the number one sport across the world.¹⁷³ The U.S. has always wanted to be a part of international soccer and wants to continue being a part of international soccer after capturing the interest of soccer fans in the U.S. in the 1994 World Cup.¹⁷⁴

FIFA has complete control over who is allowed to participate in the World Cup and international soccer.¹⁷⁵ It would be a shame if the USSF, which has built itself up to world level, was no longer able to participate in FIFA. This would occur if, in *Frasier*, there is a ruling adverse to MLS. Some commentators believe that FIFA will not ban the USSF from

168. *Id.*

169. Mathew Engel, *Soccer? Who's a Sucker?*, THE GUARDIAN, June 17, 1994, available in LEXIS, World Library, ALLWLD File.

170. *About MLS*, *supra* note 7.

MLS believes [the] single entity structure enables it to avoid many of the pitfalls that have plagued other professional sports leagues. This single entity design provides MLS and its members with the ability to: limit the financial disparities between large and small markets; offer commercial affiliates an integrated sponsorship and licensing program; decrease the opportunity for sponsorship ambush; gain economies of scale in purchasing power and cost control; and make decisions in the best interest of the entire league rather than just one team.

Id.

171. *See supra* text accompanying notes 121, 123.

172. *See supra* text accompanying notes 117, 123.

173. Engel, *supra* note 169.

174. *See supra* text accompanying note 122.

175. Copetas, *supra* note 5.

international soccer.¹⁷⁶ However, a ban seems likely because "the last thing [FIFA] wants to see is the world's biggest market not being compliant with its wishes."¹⁷⁷ It is this author's opinion that the ban is likely because World Cup Soccer has succeeded without the U.S.'s involvement. Further, even if FIFA does not ban the USSF and there is a ruling against MLS, this author thinks FIFA will probably not allow the U.S. to host the World Cup again as punishment. Either way, it appears that a ruling against MLS will hurt the popularity of U.S. soccer and also will take away a potential new sports market in the U.S.

4. FIFA will become Unwilling to Cooperate with South America, Africa, and Asia

An adverse decision against FIFA will also present problems for other countries wishing to start leagues in other parts of the world.¹⁷⁸ FIFA will be unwilling to support startup leagues like MLS in those countries for fear that the laws in those countries will circumvent FIFA's remaining ability to utilize its transfer rules.¹⁷⁹ In turn, this author believes, a ruling against FIFA can affect those countries' international status for World Cup tournaments and opportunities to host the World Cup.

V. A COMPLETE ANALYSIS OF THE FIFA RULES UNDER U.S. ANTITRUST LAW AND POLICY

The issues dealing with player restraints have been very important in the development of U.S. antitrust law in professional sports.¹⁸⁰ It seems that the litigation at hand will also be influential in continuing the progress of antitrust law in sports.

One issue the court looks at is whether the transfer rules and the limits on foreign players are illegal restraints on player movement.¹⁸¹ Without considering the single entity defense, it appears that the rules imposed by MLS are illegal restraints on player movement. *Mackey* clearly establishes

176. Grahame L. Jones, *Going Down: Trouble at Every Level on MLS Elevator Ride*, L.A. TIMES, May 28, 1997, available in LEXIS, World Library, ALLWLD File.

177. Copetas, *supra* note 5.

178. *Id.*

179. *Id.*

180. CHAMPION, *supra* note 14, at 61.

181. Copetas, *supra* note 5.

the tests required to determine this issue.¹⁸² The rules would not be considered under the per se approach because MLS, as a sports league, requires some form of cooperation between the teams in order to be applied.¹⁸³

The appropriate test is the rule of reason approach. Therefore, the question is whether the MLS rules are "justified by legitimate business purposes and [are] no more restrictive than necessary."¹⁸⁴ To answer this question, the court must balance the anticompetitive effects of the restraint with the procompetitive effects.¹⁸⁵ The players argue that they cannot move as free agents or attain their comparable market value.¹⁸⁶ MLS is arguing that the rules are essential to maintain the integrity of the game.¹⁸⁷ Further, MLS fears that, without the rules, players will flock to the larger market teams, hurting the smaller market teams and risking the existence of the league.¹⁸⁸

The arguments brought by the players and MLS are essentially the same as those arguments brought by the players and the NFL in *Mackey*.¹⁸⁹ This author believes that the court would decide in favor of the players on their argument. However, the main issue that will be decided in *Frasier* is whether MLS is a single entity. This issue revolves around the language of Section 1 of the Sherman Act.¹⁹⁰ If MLS is deemed a single entity by the courts, there will be no need to decide whether the rules imposed by MLS are illegal restraints on player movement.¹⁹¹

182. *Mackey v. National Football League*, 543 F.2d 606, 616 (8th Cir. 1976).

183. See *supra* note 23 and accompanying text.

184. *Mackey*, 543 F.2d at 620.

185. *Id.*

186. Ruskin, *supra* note 31, at 7.

187. See *supra* note 169 and accompanying text.

188. *Id.*

189. *Mackey*, 543 F.2d at 620-21. The court should probably be concerned with the threat to the existence of MLS as it was with the NFL in *Mackey*. However, there are other means that can be utilized to preserve the league's existence, such as special contract provisions, the draft, and collective bargaining agreements. *Id.*

190. Sherman Act § 1, 15 U.S.C. § 1 (1994).

191. See *supra* note 32 and accompanying text.

The court has made clear that professional sports leagues can apply the single entity defense.¹⁹² MLS is structured as a single entity.¹⁹³ Therefore, under *Copperweld*,¹⁹⁴ MLS can utilize the single entity defense. Besides the fact that MLS is structured as a single entity, MLS appears to pass the two-factor functional test applied in *Copperweld*.¹⁹⁵ Under the first factor, the teams and MLS have a "complete unity of interest."¹⁹⁶ There is nothing to suggest that the teams operate individually or apart from MLS. All of the teams are owned by MLS, not by individual separate entities.¹⁹⁷ The whole of MLS functions as a single corporation.¹⁹⁸ The second factor also suggests that MLS is a single entity. There are no "independent economic factors [forming] a common plan."¹⁹⁹ The teams were never separate entities that joined to form MLS.²⁰⁰ MLS and the teams have always had one common interest and there never was a sudden joining of economic resources that had previously served different interests.²⁰¹

Another point that should influence the court centers on the other relevant antitrust cases where the single entity defense was raised.²⁰² There is an important distinction between this precedent and the case at hand. In the prior cases, there was significant evidence proving that competition

192. See *Seabury Management, Inc. v. Professional Golf Ass'n of Am., Inc.*, 878 F. Supp. 771, 778 (D. Md. 1994). See also *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593, 598-99 (7th Cir. 1996).

193. *About MLS*, *supra* note 7. "MLS, a limited liability company, was organized, both structurally and operationally, as a single entity, much like a single corporation with operating subsidiaries or divisions." Ruskin, *supra* note 31, at 7.

194. See generally *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

195. Ruskin, *supra* note 31, at 6. The court must consider two factors in order to enforce the single entity defense. *Id.*

196. See *supra* note 54 and accompanying text.

197. Ruskin, *supra* note 31, at 7.

198. See *supra* note 193 and accompanying text.

199. See *supra* note 55 and accompanying text.

200. See *supra* note 193 and accompanying text.

201. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). *Copperweld* explains exactly what is required to establish this second factor. Here, there is no evidence that MLS and the teams ever were separate entities. In fact MLS owns all of the 12 teams. See *supra* note 134 and accompanying text.

202. See generally *North Am. Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982); *Los Angeles Mem'l Coliseum v. National Football League*, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984); *Sullivan v. National Football League*, 34 F.3d 1091 (1964), *cert. denied*, 115 S.Ct. 1252 (1995); *McNeil v. National Football League* 790 F. Supp 871 (D. Minn. 1992).

between the teams occurred not only on the field but off the field as well.²⁰³ MLS and the teams do not compete off the field.²⁰⁴ There is little evidence to suggest that off-the-field competition exists because there are no separate individual interests by the teams. The only evidence suggesting competition off the field results from the team operators performing their duties for the corporation, MLS.²⁰⁵ This author does not believe this evidence is significant when compared to the complete function of MLS, its operators, and its investors.

Based on these factors, the structure of MLS, the facts, and the relevant case law, the court should find for MLS under the single entity defense. There are other justifications supporting the single entity defense for MLS. One of these justifications concerns the *Bosman* decision and the players in the *Fraser* litigation who are seeking the same benefits.²⁰⁶ In *Bosman*, the court held that the transfer rules and foreign player restrictions were illegal but the court limited its decision to EC laws.²⁰⁷ Similarly, the district court in *Fraser* must confine its decision to the single entity issue under U.S. antitrust law.²⁰⁸ The district court will not deny MLS the opportunity to use the single entity defense, unless the players have some justification for rejecting the defense under U.S. antitrust law.²⁰⁹ It is the opinion of this author that the players have no justification, and the fact that the ECJ decided for the players in *Bosman* is irrelevant to the case at hand.

There are also a number of policy justifications that provide further support for MLS. These justifications revolve around maintaining the integrity of the game. Preserving the integrity of the game is the motto for

203. See *supra* note 44 and accompanying text.

204. Ruskin, *supra* note 31, at 7. The only competition occurs on the field. The investors "share profits and allocate losses generally on a pro rata basis." *Id.*

205. *Id.* The team operators are "responsible for certain expenses, such as local marketing and promotion, and team staffing, including hiring coaches and a general manager." *Id.*

206. Copetas, *supra* note 5.

207. See Case C-415/93, Union Royale Belge des Societes de Football Ass'n v. Bosman, 1995 E.C.R. I-4921, 1 C.M.L.R. 645 (1995).

208. Sherman Act § 1, 15 U.S.C. § 1 (1994). This act deals with all illegal conspiracies that restraint interstate commerce. *Id.*

209. See *Seabury Management, Inc. v. Professional Golf Ass'n. of Am., Inc.*, 878 F. Supp. 771 (D. Md. 1994). The court allowed the single entity defense. *Id.* See also *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593, 598-99 (7th Cir. 1996). The court stated that the single entity defense could be utilized by a sports league. *Id.*

FIFA.²¹⁰ This motto is essential to soccer's existence and it increases fan support throughout the world.²¹¹ FIFA realizes that soccer is no longer just a sport, but it is also a business. However, FIFA does not want to see MLS, and more specifically the game of soccer, turn all of its concentration towards large money potential. Further, without some form of control over the players' salaries, MLS and the game of soccer will succumb to the financial allure that plagues other professional sports leagues. This in turn will drive away the fans from the world's most popular game.

One last factor that the district court may want to consider is the reprisal from FIFA should the court rule in favor of the players. FIFA could simply expel the USSF from international soccer, ban FIFA acceptance of MLS, forbid the U.S. from hosting any future World Cup games, and forbid new leagues in South America, Africa, and Asia.²¹² These are extreme reprisals but they are very likely because FIFA does not need U.S. support to make money. Again, soccer is the most popular sport in the world, and FIFA already has its fan base.²¹³ Also, FIFA will not tolerate countries ignoring its rules.²¹⁴

VI. CONCLUSION

In light of these relevant justifications and the fact that the structure of MLS is a single entity under Section 1 of the Sherman Act, the court in *Frasier*, should determine that there was no violation under the Act. Even if the court were to consider *Bosman* as a policy justification, the U.S. district court should look to the corporate structure of MLS and recognize that it has centralized control over the operations of the league. *Bosman* was decided under European Community law.²¹⁵ Similarly, the District Court in *Fraser* needs to answer the single entity issue under U.S. antitrust law.²¹⁶ If the court considers this issue, this author believes the court will find that MLS is a single entity and should not be subjected to antitrust scrutiny. Further, this author concludes that the policy arguments raised

210. Copetas, *supra* note 5.

211. *Id.*

212. *Id.*

213. Engel, *supra* note 169.

214. Copetas, *supra* note 5.

215. See generally Case C-415/93, Union Royale Belge des Societes de Football Ass'n v. Bosman, 1995 E.C.R. I-4921, 1 C.M.L.R. 645 (1995).

216. See *supra* note 208 and accompanying text.

show that the U.S. wants to maintain its status in the international world of soccer and a ruling adverse to MLS will severely threaten the U.S.'s position and interest in the game.

Mark D. Mako

